FILED
96 917 SEP 19 1996
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT and AGENT SCOTT L. FRALEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. KOLOSKY
Counsel of Record
WORTH LAW OFFICES, P.C.
Attorneys for Petitioners
515 Linden Street
Third Floor
Allentown, Pennsylvania 18101
(610) 437-4896

9993

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

76 pp

QUESTION PRESENTED FOR REVIEW

Whether a search warrant is defective and unlawful where it does not particularly describe or identify with specificity the items to be searched for and seized as required by the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pennsylvania Rule of Criminal Procedure 2005(b)?

Proposed Answer: Yes.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Rule Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. A search warrant is defective and unlawful where it does not particularly describe or identify with specificity the items to be searched for and seized as required by the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pennsylvania Rule of Criminal Procedure 2005(b).	7
Conclusion	16

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bram v. United States, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897) 10

Commonwealth v. Bagley, 408 Pa. Super. 188, 596 A.2d 811, *appeal denied*, 531 Pa. 637, 611 A.2d 710 (1991), *cert. denied*, __ U.S. __, 113 S. Ct. 606 (1992) 12

Commonwealth v. Bleigh, 402 Pa. Super. 169, 586 A.2d 450 (1991) 12

Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) 11

Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) 11

Commonwealth v. Eichelberger, 352 Pa. Super. 507, 508 A.2d 589 (1986) 12

Commonwealth v. Grossman, 521 Pa. 290, 555 A.2d 896 (1989) 11, 13

Commonwealth v. Kohl, 532 Pa. 152, 615 A.2d 308 (1992) 10

Commonwealth v. Park, 422 Pa. Super. 393, 619 A.2d 735 (1993) 11

Contents

Page

Commonwealth v. Reese, 520 Pa. 29, 549 A.2d 909 (1988), *cert. denied*, __ U.S. __, 110 S. Ct. 3237, 111 L. Ed. 2d 748 (1990) 12, 13

Commonwealth v. Santner, 308 Pa. Super. 67, 454 A.2d 24 (1982), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3585, 82 L. Ed. 2d 883 (1984) 12

Commonwealth v. Searles, 450 Pa. 384, 302 A.2d 335 (1973) 12

Commonwealth v. Smyser, 205 Pa. Super. 599, 211 A.2d 59 (1965) 12

Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) 10

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979) 11

Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927) 12

Matter of Property, ETC., 644 F.2d 1317 (9th Cir. 1981) 13

Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) 11

Schmerber v. State of California, 384 U.S. 757, 86 S. Ct. 1826 (1966) 10

Contents

Page

Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) 11

United States v. Abrams, 615 F.2d 541 (1st Cir. 1980) 12

United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965) 11

Statute Cited:

28 U.S.C.A. § 1257(a) 2

United States Constitution Cited:

Article 1, Section 8 ..... i, 2, 3, 6, 7, 9, 11, 12, 13, 14

Fourth Amendment . i, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16

Fourteenth Amendment 10

Rules Cited:

Pennsylvania Rules of Criminal Procedure:

Rule 323 14

Rule 323(a) 14

Rule 323(c) 14

Rule 324 ..... 3, 4, 6, 7, 14

Contents

Page

Rule 2005(b) ..... i, 2, 3, 6, 7, 9, 10, 12, 14

Rule 2005(c) 12

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania in *Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew v. Commonwealth of Pennsylvania, Office of Attorney General, Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit and Agent Scott L. Fraley* Dated June 21, 1996 ..... 1a

Appendix B — Memorandum Opinion and Order of Court of Common Pleas, Dauphin County, Pennsylvania in *In Re: The Tenth Statewide Investigating Grand Jury, In Re: Seized Property of Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, Search Warrant No. L-18102* Dated March 25, 1996 ..... 2a

Appendix C — Order of the Court of Common Pleas of Northhampton County, Pennsylvania, Criminal Division, in *In Re: The Seized Property of Rapid Return, Inc. Gene Bartholomew and Robin Bartholomew* Dated November 2, 1995 ..... 9a

Appendix D — Opinion and Order of the Court of Common Pleas of Lehigh County, Pennsylvania, Criminal Division, in *In Re: Seized Property of Gene Bartholomew, et ux.* Filed November 22, 1995 .... 13a

Contents

	Page
Appendix E — Motion for Return of Property in the Court of Common Pleas of Northhampton County, Pennsylvania, Criminal Division Dated September 11, 1995 with Exhibits	22a
Appendix F — Stipulation of Facts for Motion for Return of Property in the Court of Common Pleas of Northhampton County, Pennsylvania, Criminal Division Dated October 13, 1995	28a
Appendix G — Letter of Transmittal from the Honorable G. Thomas Gates to Counsel Dated March 26, 1996	32a
Appendix H — Petition for Review in the Supreme Court of Pennsylvania	33a
Appendix I — Motion for Return of Property Pursuant to Pa. R. Crim. P. 324 with Exhibits	39a
Appendix J — Opinion and Order of the Court of Common Pleas of Lehigh County, Pennsylvania, Criminal Division Dated October 9, 1995 with Exhibits	44a
Appendix K — Handwritten Order	52a

OPINIONS BELOW

1. *Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, Petitioners v. Commonwealth of Pennsylvania, Office of Attorney General, Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit and Agent Scott L. Fraley, Respondents*; Supreme Court of Pennsylvania No. 57 M.D. Misc. Dkt.1996. (*See* App. A, 1a).

2. *IN RE: THE TENTH STATEWIDE INVESTIGATING GRAND JURY, IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW, SEARCH WARRANT NO. L-18102;* SUPREME COURT OF PENNSYLVANIA NO. 68 M.D. 1994, DAUPHIN COUNTY COMMON PLEAS NO. 601 M.D. 1994, NOTICE, NO. 6. (*See* App. B, 2a).

3. *IN RE: SEIZED PROPERTY OF RAPID RETURN, INC. GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW,* IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, NO. M-217-1995. (*See* App. C, 9a).

4. *IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW, ET UX.*, IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, NO. 402-M/1995. (*See* App. D, 13a).

STATEMENT OF JURISDICTION

The Per Curiam Order from which Review is sought in the within Petition for Writ of Certiorari was entered on June 21, 1996, in the Supreme Court of Pennsylvania.

Jurisdiction is conferred upon the United States Supreme Court to review the question presented in the within Petition for Writ of Certiorari pursuant to 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. U.S. Const. Amend. IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Pa. Const. Art. 1 Section 8.

> § 8 Security from Searches and Seizures.
>
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any persons or things shall issue, without probable cause, supported by Oath or affirmation subscribed to by the affiant.

3. Pa. R. Crim. P. 2005(b).

> Contents of Search Warrant.
>
> Each search warrant shall be signed by the issuing authority and shall:

(b) identify specifically the property to be seized.

STATEMENT OF THE CASE

This case originated on September 25, 1995, in the Court of Common Pleas of Northampton County, Pennsylvania, where Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, hereinafter "Petitioners", filed a Motion for Return of Property pursuant to Pa. R. Crim. P. 324. (*See* App. E, 22a).

The Petitioners' contention in said Motion and now before this Honorable Court, is that the subject search warrant No. L 18102 (*See* Lodging Appendix, pp. 1-2) issued by the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury, is defective and unlawful because it fails to identify specifically the property to be searched for and seized, in violation of the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pa. R. Crim. P. 2005(b).

The salient facts relating to the subject search warrant, and seized property in relation thereto, are set forth in the Stipulation of Facts for Motion for Return of Property entered into between the parties. (*See* App. F, 28a).

On or about October 4, 1995, the Commonwealth filed a Motion to Present Petitioners' Motion, Seeking Return of Property Seized Pursuant to a Search Warrant Issued by the Supervising Judge of the Tenth Statewide Investigating Grand Jury, to the Supervising Judge.

Also, on or about October 4, 1995, the Commonwealth filed an Answer and New Matter to Petitioners' Motion for Return of Property pursuant to Pa. R. Crim. P. 324.

On or about October 9, 1995, Petitioners' filed a Reply to Commonwealth's New Matter.

On or about October 9, 1995, the Commonwealth filed a Brief in Support of its Motion to Transfer Jurisdiction of Petition for Return of Property pursuant to Pa. R. Crim. P. 324 to the Supervising Judge of the Tenth Statewide Investigating Grand Jury.

On or about October 9, 1995, Petitioners' filed an Answer to the Commonwealth's Motion to Present Petitioners' Motion Seeking Return of Property Seized pursuant to a search warrant issued by the Supervising Judge of the Tenth Statewide Investigating Grand Jury, to the Supervising Judge.

On or about October 9, 1995, Petitioners' filed a Brief Contra the Commonwealth's Motion to Present Petitioners' Motion, Seeking Return of Property Seized Pursuant to a Search Warrant Issued by the Supervising Judge of the Tenth Statewide Investigating Grand Jury to the Supervising Judge.

On or about October 13, 1995, the Commonwealth filed a Memorandum of Law in Support of Denial of Petitioners' Motion for Return of Property.

On or about October 20, 1995, Petitioners' filed a Brief in support of their Motion for Return of Property pursuant to Pa. R. Crim. P. 324.

On November 2, 1995, the Honorable F.P. Kimberly McFadden, Judge of the Court of Common Pleas of Northampton County, Pennsylvania, issued an Order granting the Commonwealth's Motion to Transfer Jurisdiction of the Motion for Return of Property, pursuant to Pa. R. Crim. P. 324, to the Supervising Judge of the Tenth Statewide Investigating Grand Jury. (*See* App. C, 9a).

On November 14, 1995, the Commonwealth filed a Motion to Transfer Records of the said Northampton County action to the Supervising Judge of the Tenth Statewide Investigating Grand Jury for disposition, and on November 15, 1995, the Honorable Robert A. Freedberg, President Judge of the Court of Common Pleas of Northampton County, Pennsylvania, issued an Order granting the said Motion.

On March 25, 1996, the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury who issued the subject search warrant, issued an Order and Memorandum Opinion denying the Petitioners' Motion for Return of Property, ruling that the search warrant and subsequent search did not violate the United States and Pennsylvania Constitutions, nor the Pennsylvania Rules of Criminal Procedure. (*See* App. B, 2a).

It is believed that the original Order and Memorandum Opinion was filed by Judge Gates under seal in the Clerk of Courts of Dauphin County, as reflected on the letter of transmittal received by counsel herein on March 29, 1996. (*See* App. G, 32a).

On April 4, 1996, Petitioners filed a Petition for Review of the said March 25, 1996 Order, denying their Motion for Return of Property, with the Supreme Court of Pennsylvania - Middle District. Said Petition raised the same issue which is now before this Honorable Court. (*See* App. H, 33a).

On June 21, 1996, the Supreme Court of Pennsylvania - Middle District issued a Per Curiam Order denying the said Petition for Review. (*See* App. A, 1a).

It is significant to note that on September 14, 1995, Petitioners, Gene Bartholomew and Robin Bartholomew, also

filed a Motion for Return of Property pursuant to Pa. R. Crim. P. 324 in case No. 402-M/1995 in the Court of Common Pleas of Lehigh County, Pennsylvania.

The Petitioners' contention in said Lehigh County Motion was that two search warrants which were executed at their home and business, which warrants were also issued by the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury, were defective and unlawful for the identical reason that they failed to identify specifically the property to be searched for and seized in violation of the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pa. R. Crim. P. 2005(b). (*See* App. I, 39a and Lodging Appendix, pp. 4, 5, 8 & 9).

Thereafter, despite the fact that the Commonwealth filed a Motion to Transfer Petitioners' Motion seeking Return of Property to the Supervising Judge of the Tenth Statewide Investigating Grand Jury, the Honorable Lawrence J. Brenner, by Order and Opinion dated October 9, 1995, denied the Commonwealth's Motion, ruling that the language of Pa. R. Crim. P. 324 clearly demonstrates that the Court of Common Pleas of Lehigh County had jurisdiction over the Petitioners' Motion for Return of Property. (*See* App. J, 44a).

On November 3, 1995, a hearing was then held before Judge Brenner on the Petitioners' Motion for Return of Property and, by Order and Opinion dated November 22, 1995, Judge Brenner granted said Motion, ruling that the subject search warrants were unlawful, as they failed to state with particularity the items to be seized, in violation of the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Rule 2005(b) of the Pennsylvania Rules of Criminal Procedure. (*See* App. D, 13a).

Finally, on December 7, 1995, following evidentiary hearing, Judge Brenner ordered that all property seized be returned to the Petitioners, as no evidence was presented by the Commonwealth to establish that the seized property was contraband. (*See* App. K, 52a).

REASON FOR GRANTING THE WRIT

I.

A SEARCH WARRANT IS DEFECTIVE AND UNLAWFUL WHERE IT DOES NOT PARTICULARLY DESCRIBE OR IDENTIFY WITH SPECIFICITY THE ITEMS TO BE SEARCHED FOR AND SEIZED AS REQUIRED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION AND PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 2005(b).

That the underlying Motion for Return of Property was filed pursuant to Pa. R. Crim. P. 324, which provides:

> RULE 324. MOTION FOR RETURN OF PROPERTY:
>
> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of Common Pleas for the judicial district in which the property was seized.
>
> (b) The Judge hearing such motion shall

> receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the Court determines that such property is contraband, in which case the Court may order the property to be forfeited.
>
> (c) A motion to suppress evidence under Rule 323 may be jointed with a motion under this Rule.

The Petitioners contend that they were aggrieved by the seizure of property pursuant to the execution of a defective and unlawful search warrant for the reason that the search warrant failed to identify specifically the property to be seized. In fact, as stipulated by the parties, the search warrant indicated the identification of items to be searched and seized as "SEE EXHIBIT 'A' SEALED BY ORDER OF THE COURT". (*See* Stipulation at paragraph 7, App. F, 29a).

It is significant to note that following exhaustive research, counsel herein has uncovered no authority empowering Judge Gates to seal the identity of the property to be seized in the search warrant. In fact, in this case, the Commonwealth of Pennsylvania, through Letty A. Kress, Esquire, Deputy Attorney General, made application for an Order *unsealing* the list of items to be searched for and seized under said search warrant, after a Motion for Return of Property was filed on September 14, 1995, in Lehigh County, Pennsylvania, case No. 402-M-95.

Thereafter, on September 18, 1995, Senior Judge G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury and the Issuing Authority of the said search warrant, entered an Order directing that said Exhibit "A" (the items to be

searched for and seized) be unsealed and made available for public inspection. Said items were served on Paula Bitterman of Petitioner, Rapid Return, Inc., on September 21, 1995. (*See* Stipulation at paragraph 10, App. F, 30a).

It is clear that the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pa. R. Crim. P. 2005(b) require the subject search warrant to particularly describe and identify specifically the property or things to be seized.

U.S. Const. Amend. IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Pa. Const. Art. 1, Section 8:

> § 8. Security from searches and seizures
>
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation subscribed to by the affiant.

Pa. R. Crim. P. 2005(b):

> Contents of search warrant
>
> Each search warrant shall be signed by the issuing authority and shall:
>
> > (b) identify specifically the property to be seized.

Historically, this Honorable Court recognized that the Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures, and provides that no warrants may issue except upon probable cause supported by oath or affirmation and unless particularly describing the place to be searched and the person or things to be seized. The Constitutional protection against unreasonable searches and seizures is routed in principles of humanity and civil liberty. *Bram v. United States,* 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897).

Implicit in the Constitution is its recognition of individual freedom. It relates to the essence and not the externals of personal liberty and private property. *Katz v. Unites States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state. The security afforded to privacy against arbitrary intrusion by the police is at the case of the Fourth Amendment and basic to a free society. *Commonwealth v. Kohl,* 532 Pa. 152, 154, 615 A.2d 308, 311 (1992) (*citing Schmerber v. State of California,* 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966).

Both the Fourth Amendment to the Unites States Constitution and Article 1, Section 8 of the Pennsylvania Constitution, which is more expansive than those rights afforded under the Fourth Amendment, provide protection of *individual privacy*. (Emphasis supplied). *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *Commonwealth v. Park*, 422 Pa. Super. 393, 619 A.2d 735 (1993).

In Pennsylvania, the right to be free from unreasonable searches and seizures is tied to the implicit right to privacy. *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979).

There can be no question under the afore-cited authority that the *warrant itself* must identify the specific property to be seized. The requirement is not met if the affiant and issuing authority are aware of what items are to be seized if the warrant itself does not identify them specifically, because the Constitutional protections extend not to the government, but to the *individual* (Emphasis supplied).

Indeed, the purpose of the requirement that the search warrant name or describe with particularity the property to be seized is to discourage general or exploratory searches, and the failure to name or describe with sufficient particularity operates to invalidate the warrant. *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

It is settled Fourth Amendment jurisprudence that a warrant must be particular and supported by probable cause. *Payton v. New York*, 445 U.S. 573, 583-4, 100 S. Ct. 1371, 1378-9, 63 L. Ed. 2d 639 (1980); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). The more rigorous Pennsylvania Constitutional provision requires no less. *Commonwealth v. Grossman*, 521 Pa. 290, 555 A.2d 896 (1989);

Commonwealth v. Smyser, 205 Pa. Super. 599, 211 A.2d 59 (1965).

In Pennsylvania, the Superior Court has held that the use of a search warrant as a general investigative tool is prohibited by both the United States and Pennsylvania Constitutions, and that the search warrant must specifically identify the things to be seized. *Commonwealth v. Bagley,* 408 Pa. Super. 188, 596 A.2d 811, *appeal denied,* 531 Pa. 637, 611 A.2d 710 (1991), *cert. denied,* __ U.S. __, 113 S. Ct. 606 (1992).

It is a fundamental rule of law that a warrant must name or describe with particularity the property to be seized and the person or place to searched. *Commonwealth v. Eichelberger,* 352 Pa. Super. 507, 513, 508 A.2d 589, 592 (1986), *citing* Pennsylvania Constitution, Article 1, Section 8; Pa. R. Crim. P. 2005(b) and (c); and *Commonwealth v. Searles,* 450 Pa. 384, 302 A.2d 335 (1973). *See also, Commonwealth v. Reese,* 520 Pa. 29, 32, 549 A.2d 909, 910 (1988), *cert. denied,* __ U.S. __, 110 S. Ct. 3237, 111 L. Ed. 2d 748 (1990); *Commonwealth v. Bleigh,* 402 Pa. Super. 169, 174, 176, 586 A.2d 450, 453 (1991).

Further, it is well established that the particularity requirement prohibits a warrant that is not particular enough. Such warrant is unconstitutional for its lack of particularity in that it authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize. This will result in general "rummaging" banned by the Fourth Amendment to the United States Constitution. *Commonwealth v. Santner,* 308 Pa. Super. 67, 69-70 n. 2, 454 A.2d 24, 25 n. 2 (1982), *cert. denied,* 468 U.S. 1217, 104 S. Ct. 3585, 82 L. Ed. 2d 883 (1984). *Accord, United States v. Abrams,* 615 F.2d 541, 543 (1st Cir. 1980); *See Marron v. United States,* 275 U.S. 192, 195, 48 S. Ct. 74, 75, 72 L. Ed. 231 (1927).

In interpreting the particularity requirements set forth in Article 1, Section 8 of the Pennsylvania Constitution, the Pennsylvania Supreme Court has said that the language of the Pennsylvania Constitution requires that a warrant describe the items to be seized "as nearly as may be", and has held that the clear meaning of the language is that *the warrant* must describe the items as specifically as is reasonably possible. Our Court also concluded that this requirement is more stringent than that of the Fourth Amendment, which merely requires particularity in the description. *Commonwealth v. Reese,* 520 Pa. 29, 31-32, 549 A.2d 909, 910 (1988), *cert. denied,* __ U.S. __, 110 S. Ct. 3237, 111 L. Ed. 2d 748, (1990); *Commonwealth v. Grossman,* 521 Pa. 290, 555 A.2d 896 (1989).

In the case at bar, there can be no question that the subject warrants were issued in violation of the requirements of the United States and Pennsylvania Constitutions, as well as the Pennsylvania Rules of Criminal Procedure. Here, there is a clear violation where the warrants do not describe or identify *any* property or things to be seized.

Moreover, not only did the warrant not describe or identify any property or things to be seized, but no affidavit of probable cause accompanied the warrant to notify the aggrieved parties what specific or particular items were to be searched for and seized. Thus, the warrant in question cannot be "saved" from a finding that it is unconstitutional. *Matter of Property, ETC.,* 644 F.2d 1317 (9th Cir. 1981).

The Pennsylvania Appellate Courts which have evaluated the effect of said violation have done so in the context of deciding motions for suppression of evidence in applying the exclusionary rule, where defendants charged with criminal offenses sought to prevent the Commonwealth from using unlawfully seized evidence against them. However, in the case at bar, no motion

to suppression evidence pursuant to Pa. R. Crim. P. 323(a)(c) because no charges have brought against the Petitioners. Rule 323 provides, in relevant part:

> RULE 323. SUPPRESSION OF EVIDENCE.
>
> (a) The defendant or his attorney may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights.
>
> (c) Such motion shall be made to the court of the county in which the prosecution is pending.

It is respectfully submitted that this Honorable Court should review this issue on Certiorari since it is clear that the Petitioners, as aggrieved parties, had their constitutional protection against unreasonable search and seizure violated, by the practice of a supervising judge of a statewide investigating grand jury issuing search warrants which did not identify specifically or describe with particularity the property to be searched for and seized.

For the reasons heretofore stated, not only are such search warrants violative of the Fourth Amendment to the United States Constitution, Article 1, Section 8 of the Pennsylvania Constitution and Pa. R. Crim. P. 2005(b) but the employment of such practice is capable of repetition yet evading judicial review, causing other aggrieved parties to suffer constitutional deprivations of property and privacy in the absence of this Honorable Court's Review.

This is especially so where, as here, an aggrieved party complies with Pa. R. Crim. P. 324 in filing a Motion for Return

of Property in the Court of Common Pleas for the judicial district in which the property was seized, only to have the same judge who authorized such defective and unlawful search warrant subsequently render a decision as to the legality of his own actions. This is precisely the type of government conduct that the Bill of Rights was designed to protect against.

As stated in the Opinion of Judge Brenner,

> Government, just as individuals, must be bound by the rule of law. It would be a total subterfuge of the Bill of Rights of the United States Constitution, the Pennsylvania Constitution and the Rules of Criminal Procedure to order the sealing of items to be seized at the time the search is executed and then permit the curing of said fatal defect by the opening of the sealed documents at a subsequent time.

(*See* Judge Brenner's Opinion and Order, App. D, 21a).

It is also respectfully submitted that the within Petition be granted due to the fact that the Opinion and Order of March 25, 1996, issued by Judge Gates, (*see* App. B, 2a) is in direct conflict with the Opinion and Order issued by Judge Brenner, wherein he ruled that the subject search warrants were unlawful, as they failed to state with particularity the items to be seized. (*See* App. D, 13a).

Consequently, the absence of a controlling legal decision on this issue to provide guidance and precedent and to obviate the existing inconsistent legal decisions in cases which involve an identical Fourth Amendment issue, will render the Doctrine of Stare Decisis meaningless. To avoid such a result, it is

respectfully submitted that this Honorable Court decide the important constitutional question raised in the within Petition for Writ of Certiorari.

CONCLUSION

Finally, as persons aggrieved by the subject searches and seizures, the Petitioners respectfully request review of their Petition because the underlying search warrant is defective and unlawful for the reasons heretofore stated, notwithstanding Judge Gates' interpretation of the Fourth Amendment, in a way which clearly conflicts with the Bill of Rights and the previous decisions of this Honorable Court related thereto.

Respectfully submitted,

RICHARD W. KOLOSKY
Counsel of Record
WORTH LAW OFFICES, P.C.
Attorney for Petitioners
515 Linden Street
Third Floor
Allentown, Pennsylvania 18101
(610) 437-4896

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA IN *RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW V. COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT AND AGENT SCOTT L. FRALEY* DATED JUNE 21, 1996

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 57 M.D. Misc. Dkt. 1996

RAPID RETURN INC., ET AL

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, ET AL.

ORDER

PER CURIAM:

AND NOW, this 21st day of June, 1996, the Petition for Review and both Requests are Oral Argument are denied.

TRUE AND CORRECT COPY:
ATTEST: June 24, 1996

s/ Shirley Bailey
Shirley Bailey, Chief Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA IN *IN RE: THE TENTH STATEWIDE INVESTIGATING GRAND JURY, IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW, SEARCH WARRANT NO. L-18102* DATED MARCH 25, 1996

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
No. 68 M.D. 1994

DAUPHIN COUNTY COMMON PLEAS
No. 601 M.D. 1994

NOTICE NO. 6

IN RE: THE TENTH STATEWIDE INVESTIGATING GRAND JURY

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW, SEARCH WARRANT NO. L-18102

ORDER OF COURT

AND NOW, to wit, this 25th day of March, 1996, after hearing the Motion to Return Property is hereby denied and this Order and the attached Opinion shall be sealed until further Order of the Court.

BY THE COURT

s/ G. Thomas Gates
G. THOMAS GATES, Supervising Judge

Appendix B

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
No. 68 M.D. 1994

DAUPHIN COUNTY COMMON PLEAS
No. 601 M.D. 1994

NOTICE NO. 6

IN RE: THE TENTH STATEWIDE INVESTIGATING GRAND JURY

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW and ROIN BARTHOLOMEW, SEARCH WARRANT NO. L-18102

APPEARANCES:

LETTY A. KRESS, ESQUIRE
Senior Deputy Attorney General

FOR COMMONWEALTH

WALLACE C. WORTH, ESQUIRE and
DAVID W. KOLOSKY, ESQUIRE

FOR GENE AND ROBIN BARTHOLOMEW

MEMORANDUM OPINION, GATES, SUPERVISING JUDGE, MARCH 25, A.D. 1996

On December 8, 1994 we approved the Notice of Submission (No. 6) of a case requiring the investigative resources

of the Tenth Statewide Investigating Grand Jury in order to investigate the matter.

As a part of this investigation, Agent Scott L. Fraley of the Attorney General's Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit, prepared an application for a search warrant supported by a written affidavit which fully complied with the provisions of Pa.R.Crim.P. 2006. The search warrant application specifically identified the items of property to be searched for and seized as well as the name of the place to be searched. Because of the secretive nature of the Grand Jury's investigation as well as the contents of the affidavit of probable cause, we ordered that the affidavit of probable cause and the attached list of the items to be searched for and seized be sealed for a period of sixty (60) days. We certified on the face of the warrant that good cause had been shown why the affidavit in support of the search warrant be sealed pursuant to Pa.R.Crim.P. Rule 2011(c).

Armed with a search warrant, Agents for the Office of the Attorney General and the Department of Revenue lawfully executed the search warrant of a property at 16 Drexel Drive, Northhampton, Pennsylvania and seized the items which Petitioners here seek to have returned to them.

On September 25, 1995 Petitioner filed a Motion for the Return of the Property pursuant to Pa.R.Crim.P. Rule 324.

Petitioners Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew claim that the search was illegal because the warrant did not comport with Pa.R.Crim.P. 2005(b) in that it failed to identify specifically the property to be seized. They claim that the sealing of that part of the search warrant violates

the Rule of Criminal Procedure as well as the United States and Pennsylvania Constitutions. We disagree.

Investigative Grand Jury proceedings have traditionally been conducted in secrecy. The secrecy requirement has been preserved under the Pennsylvania Investigating Grand Jury Act (42 Pa.C.S.A. §§ 4541 to 4553). Over time the necessity for secrecy has been explained by our courts. Those concerns need not be recited here to unduly lengthen this opinion. For these purposes we need only note that the requirement of secrecy prevents the concealment or destruction of items of evidence sought by the Investigating Grand Jury.

Another traditional investigating tool in criminal procedure is the search warrant. In Pennsylvania, our Supreme Court has promulgated the ground rules for obtaining and executing search warrants. Pa.R.Crim.P. Rules 2000 - 2020.

On November 21, 1990 the Legislature adopted P.L. 588, No. 138, §1 which provides as follow:

> "Upon a sufficient showing by the attorney for the Commonwealth at an ex parte hearing before a Common Pleas Court Judge, the Court shall order the District Attorney to seal the affidavit or affidavits setting forth probable cause for the issuance of a search warrant until the date of Common Pleas Court arraignment, unless the period is extended by the Court for good cause shown. . ." 42 Pa.C.S.A. §8934.

However, the Pennsylvania Supreme Court adopted

Appendix B

Pa.R.Crim.P. Rule 2011 providing for the sealing of search warrant affidavits and suspended Act 588 insofar as it is inconsistent with the search warrant Rules 2005, 2006 and 2011.[1]

Pa.R.Crim.P. Rule 2006 defines the contents of applications for search warrant. Insofar as pertinent to this matter, the Rule provides as follows:

> "Each application for a search warrant shall be supported by written affidavit(s) signed and sworn to or affirmed before an issuing authority, which affidavit(s) shall:
>
> . . .
>
> "(b) identify specifically the items or property to be searched for and seized; . . ."

The Criminal Procedural Rules further provided in Rule 2011 that a search warrant affidavit may be sealed upon good cause shown. The issuing authority must certify on the face of the warrant that good cause has been shown for the sealing of the affidavit and it shall state the period of time the affidavit is to be sealed. The affidavit may be sealed for a period not more than 60 days unless later extended in accordance with further provisions set forth in the rule.

Pa.R.Crim.P. Rule 2005 provides that each search warrant shall:

---

1. The Act purports to limit the sealing option to probable cause affidavits. Under the Supreme Court's constitutional authority over procedural matters, the suspension was justified as being inconsistent with Pa.Crim.P. 2011. See R.C.P. Rule 2020.

> "(b) identify specifically the property to be seized; . . .
>
> "(h) when applicable, certify on the face of the warrant that for good cause shown the affidavit(s) is sealed pursuant to Rule 2011 and state the length of time the affidavit(s) will be sealed."

It is further provided that law enforcement officers, upon taking property pursuant to a search warrant, shall leave with the person from whom or from whose premises the property was taken an inventory list of property taken. Rule 2008(a). That rule further provides as follows:

> "(c) Notwithstanding the requirements in paragraphs (a) and (b), the officer shall not leave a copy of an affidavit that has been sealed pursuant to Rule 2011."

It appears to us that compliance with the Rules of Criminal Procedure has been met in this case. We find no violation of the Rules of Criminal Procedure.

Further we do not believe the Rules of Criminal Procedure violate either the Pennsylvania Constitution or the United States Constitution dealing with search warrants.[2] An issuing authority

---

2. While a federal court has held that ordinarily a copy of the supporting affidavit must be left with a copy of the search warrant, *U.S. v. Thompson*, 495 F.2d 165 (D.C. Cir. 1974), no court, to our knowledge, has held that the delay in disclosure permitted by R.Crim.P. 2011 is constitutionally impermissible.

must be apprised of the place to be searched, the property that is to be search for, probable cause and an oath by the affiant. The warrant authorized by us complied with these requirements. We reviewed the warrant and issued it only after being satisfied that probable cause exists for its issuance and sealing.

Petitioner's concern for the issuance of general warrants is not applicable here. There was no general warrant; the warrant was specific both as to the identity of the property to be searched, the things to be searched for and the probable cause basis for the search.

A party claiming to be injured by a search based on a sealed affidavit has remedies. They can apply to have the warrant unsealed or, as here, they can ask for the return of the property as provided for in Rule 324 of the Rules of Criminal Procedure. In addition they can await the expiration of the sealing order or move for suppression in a pretrial proceeding in the event criminal charges are brought.

Although the matter was not raised at the hearing, we have determined that the Grand Jury may retain the evidence obtained in this investigative search for a reasonable period of time. The Statewide Investigative Grand Jury meets one week each month and, therefore, a basis exists for continued retention. Although we allow that investigative delay must be reasonable under the circumstances, we are not presented with evidence that the delay at this point is unreasonable.

After due consideration of the arguments of learned counsel and the contents of their submissions, we will dismiss the Motion to Return Property.

APPENDIX C — ORDER OF THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, IN *IN RE: THE SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW* DATED NOVEMBER 2, 1995

IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

NO. M-217-1995

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW

ORDER OF COURT

AND NOW, this 2nd day of November, 1995, the Commonwealth's Motion to Transfer Jurisdiction of the Petition for Return of Property, pursuant to Pa.R.Crim.P. 324, to the Supervising Judge of the Tenth Statewide Investigating Grand Jury is hereby GRANTED.

STATEMENT OF REASONS

1. The Commonwealth seeks to transfer jurisdiction of the Petition for Return of Property to Judge G. Thomas Gates, the Supervising Judge of the Tenth Statewide Investigating Grand Jury, because Judge Gates has exclusive jurisdiction over the litigation of all motions arising out of the investigative functions of the Grand Jury. We agree.

2. Petitioners argue, however, that the Northampton County Court of Common Pleas has jurisdiction over the Petitioners' Motion for Return of Property pursuant Pa.R.Crim.P. 324.

Appendix C

3. Rule 324(a) of the Pennsylvania Rules of Criminal Procedure states that a motion for the return of property "be *filed* in the Court of Common Pleas for the Judicial District in which the property was seized." Pa.R.Crim.P. 324(a) (emphasis added). Rule 324(b) states in part that "[t]he Judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon." Pa.R.Crim.P. 324(b).

4. Accordingly, the underlying motion for the return of property was properly *filed* in the Northampton County Court of Common Pleas, the same county in which the property was seized. Rule 324(b), however, must be read in conjunction with Chief Justice Nix's Order, dated July 6, 1994, granting Judge Gates the authority to hear all motions relating to the work of the Tenth Statewide Investigating Jury.

5. Chief Justice Nix promulgated an Order dated July 6, 1994, that states in pertinent part:

> That the Honorable G. Thomas Gates, Senior Judge of the Court of Common Pleas, Fifty-Second Judicial District, Lebanon County, Pennsylvania, is hereby designated as Supervising Judge of said Tenth Statewide Investigating Grand Jury. *All applications and motions relating to the work of the Tenth Statewide Investigating Grand Jury shall be presented to said Supervising Judge;*
>
> It is further ORDERED with respect to investigations, presentments, reports and all other proper activities of said Tenth Statewide Investigating Grand Jury that *Judge Gates,*

> *as Supervising Judge, shall have jurisdiction over all counties throughout the Commonwealth of Pennsylvania.*

Order of Chief Justice Nix, July 6, 1994 (emphasis added).

6. The authority for Chief Justice Nix's Order arises from Section 4544 of the Investigating Grand Jury Act that states in pertinent part that the Supreme Court shall:

> (1) convene a multicounty investigating grand jury having Statewide jurisdiction, or jurisdiction over all counties requested in the application by the Attorney General;
>
> (2) designate a judge of a court of common pleas to be the supervising judge over such multicounty investigating grand jury and provide that such judge shall with respect to investigations, presentments, reports, and all other proper activities of said investigating multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty investigating grand jury.

42 Pa.C.S.A. §4544(b)(1) and (2). *See also* Pa. Const. Art. V, §10(c) (stating the Supreme Court of Pennsylvania has the power to prescribe general rules governing procedure, practice and conduct of all courts and the administration of all courts).

7. Accordingly, Supervising Judge G. Thomas Gates, who has jurisdiction over Northampton County as it is in the jurisdiction of the multi-county investigating grand jury, has

jurisdiction to hear Petitioner's Motion for Return of Property as the same motion is "relat[ed] to the work of the Tenth Statewide Investigatory Grand Jury." *See Re: the Matter of the Application of the Return to Marie Shumar, John Z. Shumar, Sheb M. Shumar, and Michael J. Relvas of the Certificates of Deposit and Other Valuable Items*, No. 1992-C-9053, (J. Moran) (Northampton County Court of Common Pleas) (October 16, 1992) (ordering transfer of a Motion for Return of Property seized pursuant to a search warrant issued as part of the Eighth Statewide Investigating Grand Jury to the Supervising Judge, G. Thomas Gates).

BY THE COURT:

s/ F.P. Kimberly McFadden
F.P. KIMBERLY McFADDEN, Judge

APPENDIX D — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, IN *IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW, ET UX.* FILED NOVEMBER 22, 1995

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Case No. 402-M/1995

IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW ET UX.

ORDER

NOW, this 22nd day of November, 1995, upon consideration of Petitioner's Motion for Return of Property, after hearing held November 3, 1995, and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that an evidentiary hearing shall be held on December 7, 1995, in Court Room 3B, Lehigh County Court House, Allentown, Pennsylvania at 1:30 P.M. before the Honorable Lawrence J. Brenner to determine if any of the property seized is contraband.

BY THE COURT:

s/ Lawrence J. Brenner
LAWRENCE J. BRENNER, J.

Appendix D

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Case No. 402-M/1995

IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW ET UX.

APPEARANCES:

LETTY A. KRESS, SENIOR DEPUTY ATTORNEY GENERAL, with her, WALTER W. COHEN, ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, On behalf of the commonwealth

WALLACE C. WORTH, ESQUIRE, and RICHARD W. KOLOSKY, ESQUIRE, On behalf of the Petitioners

OPINION

LAWRENCE J. BRENNER, J.

Presently before the Court is Petitioners' Motion for Return of Property pursuant to Pennsylvania Rule of Criminal Procedure 324. A hearing was conducted before this Court on October 9, 1995, at which time the parties entered into a stipulation of facts. Based on this stipulation the Court finds as follows:

Petitioners, Gene and Robin Bartholomew are husband and wife who own and reside at 2826 Washington Street, Allentown, Pennsylvania. Petitioners also own and operate a business known as Toones Records, a Pennsylvania for profit corporation, located at 1901 West Hamilton Street, Allentown, Pennsylvania.

Appendix D

On September 11, 1995, various individuals including agents of the Commonwealth of Pennsylvania, Office of Attorney General, and Pennsylvania Department of Revenue, and an Allentown Police Officer appeared at the residence of 2826 Washington Street and conducted a search of the premises pursuant to a search warrant.[1] At that time, numerous personal and business records, bills, documents and notes were seized and removed from the residence. The search warrant indicated that the identification of items to be seized was sealed by Order of the Court.

At approximately the same time on September 11, 1995, various individuals including agents of the Commonwealth of Pennsylvania, Office of Attorney General, and Pennsylvania Department of Revenue, and an Allentown Police Officer appeared at the business of Toones Records and conducted a search of the premises pursuant to a search warrant. Again, numerous personal and business records, bills, documents and notes were seized from the premises. Likewise, the search warrant indicated that the identification of the items to be seized was sealed by Order of the Court.

On September 18, 1995, the identification of the list of items to be seized in both search warrants was unsealed by Judge Thomas Gates, the issuing authority of the search warrants.

---

1. Search warrants were approved for the residence of Gene and Robin Bartholomew and the premises of Toones Records on September 9, 1995. Senior Judge Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury was the issuing authority of said warrants. The search warrants indicated that the list of items to be seized was sealed by Order of the Court, however, at the time the search warrants were issued there is no dispute that Judge Gates was in receipt of the list of items to be seized.

Thereafter, on September 14, 1995, Petitioners filed a motion with this Court for return of property.[2]

A Motion for return of Property pursuant to Pennsylvania Rule of Criminal Procedure 324 states:

> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of Common Pleas for the Judicial District in which the property was seized.
>
> (b) The judge hearing such a motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property forfeited.
>
> (c) A motion to suppress evidence under Rule 323 may be joined with a motion under this rule.

42 Pa.C.S.A. Section 324. A motion for return of property is intended to return goods to a person aggrieved by a search and seizure based upon the right of lawful possession and the non-

---

2. There is no dispute that Petitioners are the lawful owners of the property that was seized and removed pursuant to the search warrants.

contraband status of the goods. *Commonwealth v. Pomerantz*, 393 Pa.Super. 186, 187, 573 A.2d 1149, 1150 (1989). In asserting a motion for return of property, a party must allege that he is entitled to lawful possession of the involved property. *Pomerantz* at 188, 573 A.2d at 1150. In the instant case, Petitioners have met this burden. The parties involved have stipulated to the fact that the Petitioners are the lawful owners of the property seized pursuant to the search warrants. Therefore, Petitioners may move for the return of property on the ground that they are entitled to lawful possession thereof.

Petitioners contend that they were aggrieved by a search and seizure and are entitled to return of their property as the search warrants were defective and unlawful in failing to identify specifically the property to be seized as required under the Pennsylvania and United States Constitutions and Pennsylvania Rule of Criminal Procedure 2005 (b).

Initially, we note that the protection of the individual from unlawful government searches and seizures and the need for particularity in search warrants has long been recognized in our Country. The Bill of Rights of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized.*

U.S. Const. Amend. IV. (emphasis added). The policy of the right is well established. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state." *Commonwealth v. Kohl,* 532 Pa. 152, 159, 615 A.2d 308, 311 (1992) (citing *Schmerber v. State of California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966)). Further, the security afforded to privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment and basic to a free society. *Id.* (citations omitted).

It is settled Fourth Amendment jurisprudence that a warrant must specifically list the things to be seized. *Commonwealth v. Bagley,* 408 Pa. Super. 188, 196, 596 A.2d 811, 815 *appeal denied* 531 Pa. 637, 611 A.2d 710 (1991) *cert. denied* __ U.S. __, 113 S.Ct. 606 (1992). The United States Supreme Court has stated that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Commonwealth v. Santner,* 308 Pa.Super. 67, 70, 454 A.2d 24, 25 (1982) *cert. denied* 468 U.S. 1217, 104 S.Ct. 3585 (1984) (citing *Marran v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1972)). The Court has further noted that general searches have been condemned by Americans since Colonial Days and, in fact, lead to the adoption of the Fourth Amendment. *Id.* Therefore, it is clear that the United States Constitution requires that a search warrant state with particularity the items to be seized pursuant to the warrant in order to protect the individual from arbitrary intrusion by the government.

Additionally, the protection of individual privacy against unreasonable government searches and seizures under Article 1, Section 8 of the Pennsylvania Constitution is more expansive

than that afforded under the Fourth Amendment of the United States Constitution. *Commonwealth v. Parker,* 422 Pa.Super. 393, 399, 619 A.2d 735, 738 (1993). The Pennsylvania Constitution states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things *shall issue without describing them as nearly as may be,* nor without probable cause supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. 1, Section 8. (emphasis added). In interpreting the particularity requirement set forth in the Pennsylvania Constitution, the Pennsylvania Supreme Court has said:

> The language of the Pennsylvania Constitution requires that a warrant describes the items to be seized "as nearly as may be . . ." The clear meaning of the language is that a warrant must describe the items as specifically as is reasonably possible. This requirement is more stringent than that of the Fourth Amendment, which merely requires particularity in the description. The Pennsylvania Constitution further requires the description to be as particular as is reasonable possible.

Bagley, at 196, 596 A.2d at 814. "A search warrant serves to authorize the seizure of *identifiable and existing property. Id.*

Thus, the use of a search warrant as a general investigatory tool is prohibited by both the Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution.

Moreover, the need for particularity in search warrants is specifically set forth in Pennsylvania Rule of Criminal Procedure 2005 (b) which provides in part:

> Each search warrant shall be signed by the issuing authority and shall:
>
> (b) identify specifically the property to be seized.

42 Pa.C.S.A. Section 2005 (b). The particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. *Bagley* at 195, 596 A.2d at 814. A warrant that is not particular enough will result in a general rummaging banned by the Fourth Amendment and a warrant that is overbroad will permit a carting away of all documents resulting in an unconstitutional general search and seizure. *Id.* Thus, it is a fundamental rule of law of this Country that a search warrant must name or describe with particularity the property to be seized. *Commonwealth v. Eichelberger,* 352 Pa. Super. 507, 513, 508 A.2d 589, 592 (1986) *appeal denied* 515 Pa. 619, 531 A.2d 427 (1987).

Here, the search warrants did not name or describe with particularity the property to be seized. Conversely, the search warrants in question indicated that the list of items to be seized was sealed by Order of Court. Therefore, the Petitioners had no knowledge of what items were to be seized and, in effect,

were required to submit to a general search and seizure which violated the laws of this Country and intruded upon Petitioners' privacy and dignity. Thus, the search warrants were unlawful as they failed to state with particularity the items to be seized. Government, just as individuals, must be bound by the Rule of Law. It would be a total subterfuge of the Bill of Rights of the United States Constitution, our Pennsylvania Constitution and the Rules of Criminal Procedure to order the sealing of the items to be seized at the time the search is executed and then permit the curing of said fatal defect by the opening of the sealed documents at a subsequent time.[3] This would be pure casuistry and in contravention of the very clear and simple reading of the Constitution. Therefore, we find that the Petitioners were aggrieved by a search and seizure.

Accordingly, pursuant to Pennsylvania Rule of Criminal Procedure 324, an evidentiary hearing shall be conducted to determine if any of the property seized is contraband. Absent such a finding, the property shall be returned to Petitioners.

---

3. The Commonwealth has not presented, nor have we found, any case law or statute that would permit the sealing of the list of items to be seized.

APPENDIX E — MOTION FOR RETURN OF PROPERTY IN THE COURT OF COMMON PLEAS OF NORTHHAMPTON COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED SEPTEMBER 11, 1995 WITH EXHIBITS

IN THE COURT OF COMMON PLEAS
OF NORTHHAMPTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No.:

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW

MOTION FOR RETURN OF PROPERTY
PURSUANT TO PA.R.CRIM.P. 324

NOW COME Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, by and through their counsel, Wallace C. Worth, Jr., Esquire and Richard W. Kolosky, Esquire, who do move your Honorable Court as follows:

1. Counsel herein represent Rapid Return, Inc. Income Tax Service located at 16 Drexel Drive, Northhampton, Northhampton County, Pennsylvania.

2. Counsel herein also represent Gene Bartholomew and Robin Bartholomew adult individuals and husband and wife, who reside at 2826 Washington Street, Allentown, Pennsylvania.

3. Gene and Robin Bartholomew also own and operate a business known as Toones Records, a Pennsylvania for-profit corporation, located at 1901 West Hamilton Street, Allentown, Pennsylvania.

4. The income tax returns and tax records of Gene and Robin Barthomew and Toones Records, have been prepared, maintained and kept by Rapid Return, Inc., through its certified public accountant, agent and employee, Paula Bitterman, since 1991.

5. On September 11, 1995, at approximately 8:50 a.m., several men, purporting to be agents of the Commonwealth of Pennsylvania, appeared at the business premises of Rapid Return, Inc., as set forth above, and, conducted a search of said premises, alleging said search was done pursuant to a search warrant. A true and correct copy of said search warrant is incorporated herein by reference and attached hereto as Exhibit "A".

6. Numerous tax records and tax returns, personal and business records, bills, documents, notes, etc., were seized and removed from the said business premises by said agents following said search. A true and correct copy of the receipt/ inventory of seized property form documenting same is incorporated by reference herein and attached hereto as Exhibit "B".

7. The search warrant indicated the identification of items to be searched and seized as "see Exhibit 'A' sealed by Order of the Court". Likewise, the search warrant indicated that probable cause belief was based upon "see Exhibit 'B' sealed by Order of the Court".

8. Further, the search warrant indicated that the affiant certified "for good cause shown herein that this affidavit and attachment 'A' are hereby sealed for sixty (60) days".

Appendix E

9. Rule 2005(b) of the Pennsylvania Rules of Criminal Procedure requires that the search warrant shall identify specifically the property to be seized. See *Commonwealth v. Santner,* 308 Pa. Super. 1217, 454 A.2d 24, denied 104 S. Ct. 3585, 486 U.S. 1217.

10. The said items of property which were seized and removed from the said business premises were not identified specifically as the property to be seized in the search warrant for said business.

11. Further, there is no authority empowering the Court to seal the identity of the property to be seized, and the failure to identify said property with specificity is in violation of both the United States and Pennsylvania Constitutions and Pa.R.Crim.P. 2005(b).

12. Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew are the lawful owners of the property unlawfully seized and removed, and respectfully move your Honorable Court to order the property so seized to be returned forthwith.

13. Any delay in ordering the return of the said property will result in unnecessary losses and damages to Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew.

WHEREFORE, Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, by and through their counsel, Wallace C. Worth, Jr., Esquire and Richard W. Kolosky, Esquire, pray this Honorable Court to enter an order for the return of all property unlawfully seized and removed pursuant to the search warrant executed on September 11, 1995, as set forth herein.

Appendix E

Respectfully submitted,

WORTH LAW OFFICES, P.C.

s/ Wallace C. Worth, Jr.
WALLACE C. WORTH, JR., ESQUIRE
515 Linden Street, Third Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 08132

s/ Richard W. Kolosky
RICHARD W. KOLOSKY, ESQUIRE
515 Linden Street, Third Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 43599

Appendix E

CERTIFICATE OF SERVICE

I, Richard W. Kolosky, Esquire, hereby certify that on this date I mailed a true and correct copy of the Motion for Return of Property Pursuant to Pa. R. Crim. P. 324, by U.S. First Class Mail, postage prepaid, to the individuals, at the addresses and on the date indicated below:

Letty Ann Kress, Esquire
Office of Attorney General
Drug Prosection Section
16th Floor
Strawberry Square
Harrisburg, PA 17120

s/ Richard W. Kolosky
RICHARD W. KOLOSKY
515 Linden Street, 3rd Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 43599

DATE: September 25, 1995

Appendix E

EXHIBIT A — SEARCH WARRANT

[Omitted here but submitted separately as Lodging Appendix at pp. 1-2]

EXHIBIT B — RECEIPT/INVENTORY FORM

[Omitted here but submitted separately as Lodging Appendix at p. 3]

APPENDIX F — STIPULATION OF FACTS FOR MOTION FOR RETURN OF PROPERTY IN THE COURT OF COMMON PLEAS OF NORTHHAMPTON COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED OCTOBER 13, 1995

IN THE COURT OF COMMON PLEAS
NORTHHAMPTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

NO. M – 217-1995

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW

STIPULATION OF FACTS FOR
MOTION FOR RETURN OF PROPERTY

NOW COME Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew, by and through their counsel, Wallace C. Worth, Jr., Esquire and Richard W. Kolosky, Esquire, and Commonwealth of Pennsylvania, Office of Attorney General, Thomas W. Corbett, Jr., Attorney General, by and through Letty A. Kress, Senior Deputy Attorney General, who do stipulate to facts as follows:

1. Rapid Return, Inc. Income Tax Service is located at 16 Drexel Drive, Northhampton, Northhampton County, Pennsylvania.

2. Gene Bartholomew and Robin Bartholomew, adult individuals and husband and wife, reside at 2826 Washington Street, Allentown, Pennsylvania.

3. Gene and Robin Bartholomew also own and operate a business known as Toones Records, a Pennsylvania for-profit corporation, located at 1901 West Hamilton Street, Allentown, Pennsylvania.

4. The income tax returns and tax records of Gene and Robin Bartholomew and Toones Records, have been prepared, maintained and kept by Rapid Return, Inc., through its certified public accountant, agent and employee, Paula Bitterman, since 1991.

5. On September 11, 1995, at 8:50 a.m., several agents of the Commonwealth of Pennsylvania (from the Office of Attorney General and Department of Revenue), appeared at the business premises of Rapid Return, Inc., as set forth above, and conducted a search of said premises, pursuant to a search warrant. A true and correct copy of said search warrant (without exhibits) is incorporated herein by reference and attached to Exhibit "A" of the Motion for Return of Property.

6. Numerous tax records and tax returns, personal and business records, bills, documents, notes, etc., were seized and removed from the said business premises by said agents following said search. A true and correct copy of the receipt/ inventory of seized property form documenting same is incorporated by reference herein and attached to Exhibit "B" of the Motion for Return of Property.

7. The search warrant indicated the identification of items to be searched and seized as "see Exhibit 'A' sealed by Order of the Court". Likewise, the search warrant indicated that probable cause belief was based upon "see Exhibit 'B' sealed by Order of the Court".

Appendix F

8. Further, the search warrant indicated that the affiant certified "for good cause shown herein that this affidavit and attachment 'A' are hereby sealed for sixty (60) days".

9. Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew are the lawful owners of the property seized and removed.

10. The unsealing of said items to be searched for and seized under Search Warrant, warrant control no. L 18102, was done in this case on September 18, 1995, by the Honorable G. Thomas Gates, as reflected in Exhibit A, (the Application and Order) of the Commonwealth's Answer to the Motion for Return of property. Said items to be searched and seized were served on Paula Bitterman of Rapid Return, Inc., on September 21, 1995, as reflected in Exhibit B (letter to Rapid Return with enclosure) of the Commonwealth's Answer to Motion for Return of Property.

11. As part of an ongoing investigation pursuant to the Tenth Statewide Investigating Grand Jury, Agent Scott L. Fraley of the Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit, prepared Search Warrant Control No. L 18102 along with an affidavit of probable cause and items to be searched for and seized for the premises of 16 Drexel Drive, Northhampton, Pennsylvania, and the person of Paula Bitterman of Rapid Return, Inc.

12. The Application for Search Warrant Control No. L 18102, along with the affidavit of probable cause and the list of items to be searched for and seized were submitted to the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury who issued Search Warrant, Control No. L 18102, on September 9, 1995.

Appendix F

Respectfully submitted,

10/13/95
DATE

s/ Letty A. Kress
Letty A. Kress, Esquire
Senior Deputy Attorney General
Attorney ID# 44854
Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-9578

10/13/95
DATE

s/ Wallace C. Worth, Jr.
Wallace C. Worth, Jr., Esquire
Attorney for Gene Bartholomew
and Rapid Return, Inc.
515 Linden Street, Third Floor
Allentown, PA 18101

10/13/95
DATE

s/ Richard W. Kolosky
Richard W. Kolosky, Esquire
Attorney for Robin Bartholomew
515 Linden Street, Third Floor
Allentown, PA 18101

APPENDIX G — LETTER OF TRANSMITTAL FROM THE HONORABLE G. THOMAS GATES TO COUNSEL DATED MARCH 26, 1996

Commonwealth of Pennsylvania
Fifty-second Judicial District
Municipal Building
400 South Eighth Street
Lebanon, PA 17042
(717) 274-2801 Ext: 2289

March 26, 1996

Richard W. Kolosky, Esquire
WORTH LAW OFFICES
515 Linden Street, Third Floor
Allentown, PA 18101

RE: MOTION FOR RETURN OF PROPERTY REGARDING SEARCH WARRANT NO. L-18102

Dear Mr. Kolosky:

Enclosed please find a copy of the Memorandum Opinion which I have issued on the Motion to Return Property regarding your clients, Rapid Return, Inc., and Gene and Robin Bartholomew. The original opinion has been filed under seal in the Clerk of Courts of Dauphin County.

Very truly yours,

s/ G. Thomas Gates
G. THOMAS GATES
Supervising Judge

APPENDIX H — PETITION FOR REVIEW IN THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: THE TENTH STATEWIDE INVESTIGATING GRAND JURY

IN RE: SEIZED PROPERTY OF RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW, SEARCH WARRANT L-18102

RAPID RETURN, INC., GENE BARTHOLOMEW AND ROBIN BARTHOLOMEW,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT AND AGENT SCOTT L. FRALEY,

Respondents

PETITION FOR REVIEW

Review of the March 25, 1996 Order denying Petitioners' Motion for Return of Property, issued by the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury, Supreme Court No. 68 M.D. 1994, Dauphin County No. 601 M.D. 1994, Notice No. 6.

Appendix H

WORTH LAW OFFICES, P.C.
Richard W. Kolosky, Esquire
Attorney for Petitioners
I.D. No.: 43599

515 Linden Street
Third Floor
Allentown, PA 18101
(610) 437-4896

STATEMENT OF JURISDICTION

1. The Pennsylvania Supreme Court has jurisdiction to decide the within matter pursuant to Pa.C.S.A. Rules App.Proc., Rules 1502, 702(c) and 3331(e)(3), which provide as follows:

RULE 1502. EXCLUSIVE PROCEDURE

> The appeal, the actions of equity, replevin, madamus and quo warranto, the action for a declaratory judgment, and the writs of certiorari and prohibition are abolished insofar as they relate to matters within the scope of a petition for review under this chapter. The petition for review, insofar as applicable under this chapter, shall be the exclusive procedure for judicial review of a determination of a government unit.

RULE 702. FINAL ORDERS

> (c) Supervision of Special Prosecutions or Investigations. All petitions for review under Rule 3331; (review of special prosecutions or investigations) shall be filed in the Supreme Court.

Appendix H

FILE 3331. REVIEW OF SPECIAL PROSECUTIONS OR INVESTIGATIONS

(e) General rule. Any of the following orders shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations):

(3) An order entered in connection with the supervision, administration or operation of an investigating grand jury or otherwise directly affecting an investigating grand jury or any investigation conducted by it.

NAMES OF PARTIES SEEKING REVIEW, NAME OF GOVERNMENT UNIT WHICH MADE THE DETERMINATION SOUGHT TO BE REVIEWED AND ORDER SOUGHT TO BE REVIEWED

2. Rapid Return, Inc., Gene Bartholomew and Robin Bartholomew seek review of the March 25, 1996 Order of the Honorable G. Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury, Supreme Court of Pennsylvania No. 68 M.D. 1994, Dauphin County Common Pleas No. 601 M.D. 1994, Notice No. 6.

STATEMENT OF OBJECTIONS

3. Petitioners object to the said March 25, 1996 Order, which denied their Motion for Return of Property for the following reasons:

(a) The underlying search warrant upon which the seizure

of the subject property was based is defective and unlawful for the reason that it indicates the identification of items to be searched for and seized as "see Exhibit 'A' sealed by Order of the Court";

(b) The underlying search warrant upon which the seizure of the subject property was based is defective and unlawful for the reason that there is no authority to empower the Honorable G. Thomas Gates to seal the identity of the property to be seized;

(c) The underlying search warrant upon which the seizure of the subject property was based is defective and unlawful in that it fails to identify specifically the property to be searched for and seized in violation of the Fourth Amendment to the United States Constitution;

(d) The underlying search warrant upon which the seizure of the subject property was based is defective and unlawful in that it fails to identify specifically the property to be searched for and seized in violation of Article 1 Section 8 of the Pennsylvania Constitution;

(e) The underlying search warrant upon which the seizure of the subject property was based is defective and unlawful in that it fails to identify specifically the property to be searched for and seized in violation of Pa.R.Crim.P. 2005(b);

(f) The underlying search warrant upon which the seizure of the subject property was based is defective and unlawful for the reasons stated in paragraphs (a)-(e) above, entitling Petitioners to the return of the seized property forthwith, and;

(g) The Honorable G. Thomas Gates did not have jurisdiction to decide the Petitioners' Motion for Return of

Property, instead, said Motion should have been decided by the Court of Common Pleas of Northampton County, where same was originally filed, pursuant to Pa.R.Crim.P. 324.

STATEMENT OF RELIEF

4. The Petitioners respectfully request that the March 25, 1996 Order of the Honorable G. Thomas Gates denying their Motion for Return of Property be REVERSED and that said Motion be GRANTED for the reason that the underlying search warrant is defective and unlawful because it fails to identify specifically the property to be seized as required under the Fourth Amendment to the United States Constitution, Article 1 Section 8 of the Pennsylvania Constitution and Pa.R.Crim.P. 2005(b), entitling Petitioners to the return of the seized property forthwith.

In the alternative, Petitioners respectfully request that the Order of March 25, 1996, by the Honorable G. Thomas Gates denying their Motion for Return of Property be REVERSED, and that their Motion for Return of Property and the record pertaining thereto be REMANDED back to the Northampton County Court of Common Pleas for disposition.

Respectfully submitted,
WORTH LAW OFFICES, P.C.

s/ Richard W. Kolosky
RICHARD W. KOLOSKY, ESQUIRE
Attorney for Petitioners
515 Linden Street, 3rd Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 43599

Appendix H

PROOF OF SERVICE

I, Richard W. Kolosky, Esquire, hereby certify that on this day I am serving the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa.C.S.A. Rule App. Proc. 121.

SERVICE BY CERTIFIED MAIL ADDRESSED TO THE FOLLOWING

Letty Kress, Esquire
Office of the Attorney General
Drug Prosecution Section
16th Floor
Strawberry Square
Harrisburg, PA 17120

Agent Scott L. Fraley
Bureau of Narcotic Investigation and Drug Control
Financial Investigation Union
1259 South Cedar Crest Boulevard
Suite 120
Allentown, PA 18103

DATE: April 4, 1996

s/ Richard W. Kolosky
RICHARD W. KOLOSKY, ESQUIRE
Attorney for Petitioners
515 Linden Street, 3rd Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 43599

APPENDIX I — MOTION FOR RETURN OF PROPERTY PURSUANT TO Pa. R. CRIM. P. 324 WITH EXHIBITS

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No.: 402-M/95

IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW ET UX.

MOTION FOR RETURN OF PROPERTY
PURSUANT TO PA.R.CRIM.P. 324

NOW COME Gene Bartholomew and Robin Bartholomew, by and through their counsel, Wallace C. Worth, Jr., Esquire and Richard W. Kolosky, Esquire, who do move your Honorable Court as follows:

1. Counsel herein represent Gene Bartholomew and Robin Bartholomew, adult individuals and husband and wife who own and reside at 2826 Washington Street, Allentown, Pennsylvania.

2. Gene and Robin Bartholomew also own and operate a business known as Toones Records, a Pennsylvania for-profit corporation, located at 1901 West Hamilton Street, Allentown, Pennsylvania.

3. On September 11, 1995, at approximately 7:15 a.m., several men, purporting to be agents of the Commonwealth of Pennsylvania, appeared at the residence set forth above and, at gun point, conducted a search of said premises, alleging said

search was done pursuant to a search warrant. A true and correct copy of said search warrant is incorporated herein by reference herein and attached hereto as Exhibit "A".

4. Numerous personal and business records, bills, documents, notes, etc., were seized and removed from the said residence by said agents following said search. A true and correct copy of the receipt/inventory of seized property form documenting same is incorporated by reference herein and attached hereto as Exhibit "B".

5. The search warrant indicated the identification of items to be searched and seized as "see Exhibit 'A' sealed by Order of the Court". Likewise, the search warrant indicated that probable cause belief was based upon "see Exhibit 'B' sealed by Order of the Court".

6. Further, the search warrant indicated that the affiant certified "for good cause shown herein that this affidavit and attachment 'A' are hereby sealed for sixty (60) days".

7. Also on September 11, 1995, at approximately 7:15 a.m., several men, purporting to be agents of the Commonwealth of Pennsylvania, appeared at the business set forth above and, conducted a search of said premises, alleging said search was done pursuant to a search warrant. A true and correct copy of said search warrant is incorporated by reference herein and attached hereto as Exhibit "C".

8. Numerous personal and business records, bills, documents, notes, etc., were seized and removed from the said business by said agents following said search. A true and correct copy of the receipt/inventory of seized property form

documenting same is incorporated by reference herein and attached hereto as Exhibit "D".

9. The search warrant indicated the identification of items to be searched and seized as "see Exhibit 'A' sealed by Order of the Court". Likewise, the search warrant indicated that probable cause belief was based upon "see Exhibit 'B' sealed by Order of the Court".

10. Further, the search warrant indicated that the affiant certified "for good cause shown herein that this affidavit and attachment 'A' are hereby sealed for sixty (60) days".

11. Rule 2005(b) of the Pennsylvania Rules of Criminal Procedure requires that the search warrant shall identify specifically the property to be seized. See *Commonwealth v. Santner,* 308 Pa. Super. 1217, 454 A.2d 24, denied 104 S.Ct. 3585, 486 U.S. 1217.

12. The said items of property which were seized and removed from the said residence and business were not identified specifically as the property to be seized in either the search warrant for the said residence or the search warrant for the said business.

13. Further, there is no authority empowering the Court to seal the identity of the property to be seized, and the failure to identify said property with specificity is in violation of both the United States and Pennsylvania Constitutions and Pa.R.Crim.P. 2005(b).

14. Gene and Robin Bartholomew are the lawful owners of the property unlawfully seized and removed, and respectfully

move your Honorable Court to order the property so seized to be returned forthwith.

15. Any delay in ordering the return of the said property will result in unnecessary losses and damages to the Bartholomews.

WHEREFORE, Gene Bartholomew and Robin Bartholomew, by and through their counsel, Wallace C. Worth, Jr., Esquire and Richard W. Kolosky, Esquire, pray this Honorable Court to enter an order for the return of all property unlawfully seized and removed pursuant to the search warrants executed on September 11, 1995, as set forth herein.

Respectfully submitted,
WORTH LAW OFFICES, P.C.

s/ Wallace C. Worth, Jr.,
WALLACE C. WORTH, JR., ESQUIRE
515 Linden Street, Third Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 08132

s/ Richard W. Kolosky
RICHARD W. KOLOSKY, ESQUIRE
515 Linden Street, Third Floor
Allentown, PA 18101
(610) 437-4896
I.D. No.: 43599

Appendix 1

EXHIBIT A — SEARCH WARRANT

(Omitted here but submitted separately as Lodging Appendix, at pp. 4-5)

EXHIBIT B — RECEIPT/INVENTORY FORM

(Omitted here but submitted separately as Lodging Appendix, at pp. 6-7)

EXHIBIT C — SEARCH WARRANT

(Omitted here but submitted separately as Lodging Appendix, at pp. 8-9)

EXHIBIT D — RECEIPT/INVENTORY FORM

(Omitted here but submitted separately as Lodging Appendix, at pp. 10-11)

APPENDIX J — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED OCTOBER 9, 1995 WITH EXHIBITS

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No. 402-M/1995

IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW ET UX.

ORDER

NOW, this 9th day of October, 1995, upon consideration of Commonwealth's Motion to Transfer Petitioner's Motion Seeking Return of Property to the Supervising Judge of the Tenth Statewide Investigating Grand Jury, and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that said Motion is DENIED.

BY THE COURT:

s/ Lawrence J. Brenner
LAWRENCE J. BRENNER, J.

Appendix J

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No. 402-M/1995

IN RE: SEIZED PROPERTY OF GENE BARTHOLOMEW ET UX.

APPEARANCES:

LETTY A. KRESS, SENIOR DEPUTY ATTORNEY GENERAL, with her, WALTER W. COHEN, ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, On behalf of the Commonwealth

WALLACE C. WORTH, ESQUIRE, and RICHARD W. KOLOSKY, ESQUIRE, On behalf Petitioner

OPINION

LAWRENCE J. BRENNER, J.

Presently before this Court is the Commonwealth's "Motion to Present Petitioner's Motion, Seeking Return of Property Seized Pursuant to a Search Warrant Issued by the Supervising Judge of the Tenth Statewide Investigating Grand Jury, to the Supervising Judge." For the reasons that follow, we deny the Commonwealth's Motion.

On September 9, 1995, search warrants were approved for the residence of Eugene Bartholomew and Robin Bartholomew

at 2826 West Washington Street, Allentown, Pennsylvania, and the premises of Toones Records, 1901 West Hamilton Street, Allentown, Pennsylvania.[1] Senior Judge Thomas Gates, Supervising Judge of the Tenth Statewide Investigating Grand Jury was the issuing authority of said warrants. The warrants were executed on September 11, 1995 at which time numerous items were seized.

On or about September 14, 1995, Petitioner filed a Motion for Return of Property pursuant to Pennsylvania Rule of Criminal Procedure 324. Petitioner alleged that neither search warrant identified specifically the property to be seized, in violation of Pennsylvania Rule of Criminal Procedure 2005 (b) as well as the United States and Pennsylvania Constitutions. It is alleged that the search warrants indicated that the list of items to be searched and seized was sealed by Order of Court. Subsequently, the Commonwealth filed an answer to Petitioner's Motion which raised the question of this Court's jurisdiction and claimed that the power to decide the Motion is exclusively vested with Judge Gates. On September 29, 1995, the Commonwealth then filed its Motion to Transfer Jurisdiction of Petitioner's Motion. It is the Commonwealth's Motion to Transfer Jurisdiction that we now address.

The Commonwealth maintains that Judge Gates, as the Supervising Judge of the Tenth Statewide Grand Jury has exclusive jurisdiction over the litigation of any motions arising out of the investigative functions of the grand jury. At issue here is Petitioner's Motion for Return of Property. Initially, we look to the text of the Statute to determine the proper jurisdiction of

---

1. The search warrants indicated that the identification of items to be searched was sealed by Order of Court. Similarly, the search warrants indicated that the probable cause was sealed by Order of Court.

the Petitioner's Motion. Pennsylvania Rule of Criminal Procedure 324, under which a motion for return of property is filed, states:

> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of Common Pleas for the Judicial District in which the property was seized.
>
> (b) The judge hearing such a motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property forfeited.
>
> (c) A motion to suppress evidence under Rule 323 may be joined with a motion under this rule.

42 Pa.C.S.A. §324. The language of the statute clearly demonstrates that this Court has jurisdiction over Petitioner's Motion. The Statute requires that a motion for return of property is to be filed in the Court of Common Pleas of the Judicial District in which the property was seized. Here, Lehigh County Court of Common Pleas is the appropriate forum due to the fact that it is the jurisdiction within which the search warrants were executed and the property was seized. Further, there is no

indication in the statute that the judge hearing such a motion would not be a judge of the county in which the motion was filed. Thus, it would appear that our jurisdiction is proper over motions filed with our Court. In fact, we have found no authority which would preclude this Court from retaining jurisdiction to hear a motion for return of property filed in Lehigh County and arising from a search that was executed within this Judicial District.

Additionally, we note that if the Investigating Grand Jury were to return presentments against Petitioner and a trial would commence, the venue requirements of the Investigating Grand Jury Act may require that the trial be conducted in Lehigh County as this County would have jurisdiction over the matter. See 42 Pa.C.S.A.§4551 (d). Accordingly, we conclude that this Court has proper jurisdiction to entertain Petitioner's Motion for Return of Property.

The Commonwealth contends, however, that Petitioner's Motion for Return of Property must be submitted to the Supervising Judge of the Grand Jury for adjudication. The Commonwealth bases this claim on the authority of the Supreme Court in general,[2] and the Order of Chief Justice Nix designating Judge Gates as the Supervising Judge of the Tenth Statewide Grand Jury. The Order of the Court issued by Chief Justice Nix on July 6, 1994, states in part:

> That the Honorable G. Thomas Gates, Senior Judge of the Court of Common Pleas, Fifty-second Judicial District, Lebanon County,

---

2. The Supreme Court has the power to prescribe general rules governing procedure, practice and conduct of all courts and the administration of all courts. Pa. Const. Art. V, § 10(c).

> Pennsylvania, is hereby designated as Supervising Judge of said Tenth Statewide Investigating Grand Jury. All applications and motions relating to the work of the Tenth Statewide Investigating Grand Jury shall be presented to said Supervising Judge;
>
> It is further ORDERED with respect to investigations, presentments, reports and all other proper activities of said Tenth Statewide Investigating Grand Jury that Judge Gates, as Supervising Judge, shall have jurisdiction over all counties throughout the Commonwealth of Pennsylvania

Order of Chief Justice Nix, 7/6/94. Although this Order clearly gives Judge Gates jurisdiction over the grand jury proceedings, it cannot be viewed as granting him exclusive jurisdiction over Petitioner's Motion for Return of Property.

The Commonwealth argues that Petitioner's Motion for Return of Property seeks the return of property seized as evidence by the grand jury, thus, Petitioner's Motion is a motion relating to the work of the Grand Jury as referenced in Chief Justice Nix's Order. However, it must be noted that the issuance and execution of a search warrant is not a process which involves the work of the Grand Jury. The powers of the investigating grand jury are clearly set forth in the investigating Grand Jury Act and include the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth. 42 Pa.C.S.A. §4548 (a). Moreover, the Act provides that "Such alleged offenses may be brought to the attention of such grand

jury by the Court or by the attorney for the Commonwealth, *but in no case shall the investigating grand jury inquire into alleged offenses on its own motion." Id.* (emphasis added) Therefore, the execution of a search warrant is not a defined work of the grand jury as it is beyond the scope of the Investigating Grand Jury's power. Thus, Petitioner's Motion for Return of Property is not subject to the Order of Chief Justice Nix.

Additionally, the Commonwealth contends that exclusive jurisdiction over Petitioner's Motion is granted to the Supervising Judge of the Investigating Grand Jury by the Investigating Grand Jury Act. Specifically, the Act states in part that the Supreme Court shall:

> (1) convene a multicounty investigating grand jury having Statewide jurisdiction, or jurisdiction over all counties requested in the application by the Attorney General;
>
> (2) designate a judge of a court of common pleas to be the supervising judge over such multicounty investigating grand jury and provide that such judge shall with respect to investigations, presentments, reports, and all other proper activities of said investigating multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty investigating grand jury

42 Pa.C.S.A. §4544 (b) (1) and (2). The Commonwealth suggests that the use of the terms "shall" and "all" in this section indicates that the Supreme Court is authorizing the Grand Jury Supervising Judge to hear matters arising out of the work of the Grand Jury.

We have previously noted, however, that the issuance and execution of a search warrant is not a "work involving the grand jury." Moreover, even if search warrants were construed as work of the grand jury, we do not agree that the Statute (or Order of Chief Justice Nix) grants the Supervising Judge of the Investigating Grand Jury with *exclusive* jurisdiction. The language of the Investigating Grand Jury Act does not indicate that any jurisdiction granted to the Supervising Judge would preclude concurrent jurisdiction granted another Court. Therefore, as we have determined in accordance with the Laws of the Commonwealth of Pennsylvania and the Pennsylvania Rules of Criminal Procedure, that this Court does have jurisdiction over Petitioner's Motion, any transfer of said motion would be at our discretion. We decline to exercise such discretion and, accordingly, deny the Commonwealth's Motion.

APPENDIX K — HANDWRITTEN ORDER

SURCHARGE:

LEHIGH COUNTY

In Re: Seized property of Gene Bartholomew

ocs G. Carr
No.: 402-M1190

JUDGE: Lawrence J. Brenner CLERK: KSS

ATTORNEY GENERAL: Letty Kress

DEFENDANT'S ATTORNEY: R. Koloski

NOW, December 07, 1995,

After an evidentiary hearing and in absence of any evidence that the property seized was contraband,

It is hereby ordered that the petition for Return of Seized Property is granted and the Common Wealth is directed to return any and all property seized including photostatic copies thereof to the petitioner forthwith.

By the Court
s/ illegible

Supreme Court, U.S.
F I L E D
JAN 7 1997
CLERK

No. 96-917

In the

Supreme Court Of the United States

October Term, 1996

RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT and AGENT SCOTT L. FRALEY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

Thomas W. Corbett, Jr.
Attorney General

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

Mary Benefield Seiverling
Senior Deputy Attorney General
Appeals and Legal Services
Counsel of Record

16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the question presented by the petitioner moot, where petitioner seeks review of denial of a motion for return of property and the property has been returned?

2. Is the temporary sealing of the list of items to be searched for and seized during the execution of a search warrant constitutionally permissible?

TABLE OF CONTENTS

Questions Presented i

Table of Citations iii

Statement of Jurisdiction 2

Statement of the Case 3

Reasons Why the Petition Should Be Denied 6

I. Where the Relief Sought by the Petitioners Is the Return of Property Which Has Been Returned, This Court Should Not Entertain the Moot Issue of the Propriety of the Seizure of the Property 6

II. The Temporary Sealing of the List of Items to Be Searched for and Seized During the Execution of a Search Warrant Does Not Present a Serious Constitutional Issue Worthy of Review by This Court 7

Conclusion 12

TABLE OF CITATIONS

Cases

Page(s)

Ashwander v. TVA,
297 U.S. 288 (1936) 6

Bandini Petroleum Co. v. Superior Court of California in and for Los Angeles Co.,
284 U.S. 8 (1931) 6

In re Cain,
527 Pa. 260, 590 A.2d 291 (1991) 2

Frisby v. United States,
79 F.3d 29 (6th Cir. 1996) 8

In re Gross,
476 Pa. 203, 382 A.2d 116 (1978) 2

Kremens v. Bartley,
431 U.S. 119 (1977) 6

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319 (1979) 9

In re: Seized Property of Rapid Return, Inc.,
No. 68 M.D. 1994 (Pa. Supreme Ct.),
No. 601 M.D. 1994 (Dauphin Co.)
(Notice No. 6), slip op. (March 25, 1996) . . . 9, 10

Sosna v. Iowa,
419 U.S. 393 (1975) 6

Southern Pacific Terminal Co. v. ICC,
219 U.S. 498 (1911) 7

United States Parole Comm'n. v. Geraghty,
445 U.S. 388 (1980) 2, 6

United States v. Hepperle,
810 F.2d 836 (8th Cir. 1987) *cert. denied*,
483 U.S. 1025 (1987) 8

United States v. Marx,
635 F.2d 436 (5th Cir. 1981) 8

United States v. New York Telephone Co.,
434 U.S. 159 (1977) 7

Statutes

28 U.S.C. § 1257(a) 8

PA. STAT. ANN. tit. 72, § 7268 (Purdon 1995) 3

PA. STAT. ANN. tit. 72, § 7353 (Purdon 1995) 3

Rules

Pa.R.Crim.P. 2006 9

Pa.R.Crim.P. Rule 2011(c) 10

Pa.R.A.P. 3331(d) 8

No. 96-917

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RAPID RETURN, INC., GENE BARTHOLOMEW and ROBIN BARTHOLOMEW,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BUREAU OF NARCOTICS INVESTIGATION AND DRUG CONTROL, FINANCIAL INVESTIGATION UNIT AND AGENT SCOTT L. FRALEY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the *per curiam* order of the Pennsylvania Supreme Court. The order of the Pennsylvania Supreme Court of Pennsylvania, is set forth in the appendix at Pet. App. A, 1a. That order denied review of the order of the supervising judge of the statewide investigating grand jury. The supervising judge denied petitioners' motion for return of property. The Memorandum

Opinion and Order of the Court of Common Pleas of Dauphin County, Pennsylvania, per G. Thomas Gates, Supervising Judge, are set forth at Pet. App. 2a and Pet. App. B, 2a-8a.

STATEMENT OF JURISDICTION

Suggestion of Mootness

Article III of the United States Constitution confers on the federal courts jurisdiction over cases and controversies. Litigants must have a personal interest in the case at the beginning of the litigation and their interests must persist throughout its entirety. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980).

Petitioners brought this action in Pennsylvania seeking the return of property seized during the execution of a search warrant issued by the supervising judge of an investigating grand jury. After the supervising judge denied their request they filed a petition for review with the Supreme Court of Pennsylvania. While that petition was pending, the attorneys for the Commonwealth of Pennsylvania returned all of the items seized at the time of the execution of the search warrant to counsel for petitioners. Thereafter, the respondents moved to dismiss the petition for review as moot under Pennsylvania law. *See e.g. In re Cain*, 527 Pa. 260, 263, 590 A.2d 291, 292 (1991) and *In re Gross*, 476 Pa. 203, 210-211, 382 A.2d 116, 120 (1978). The petition for review was denied.

The controversy in this case concerned whether the property seized had to be returned. The property has been returned. The case is moot.

STATEMENT OF THE CASE

Form of Action

Petitioners seek review of the denial of a motion for return of property seized during a criminal investigation by Pennsylvania law enforcement authorities.

Procedural History and Facts Necessary for Determination

Through the resources of Pennsylvania's Tenth Statewide Investigating Grand Jury, and in conjunction with other investigative techniques, probable cause was developed that evidence of violations of PA. STAT. ANN. tit. 72, § 7268 (Purdon 1995) (Criminal Sales Tax Violations) and of PA. STAT. ANN. tit. 72, § 7353 (Purdon 1995) (Criminal Employer Withholding and Personal Income Tax Violations) would be found at Rapid Return, Inc., 16 Drexel Drive, Northampton, Northampton County, Pennsylvania. Pennsylvania law enforcement authorities applied to the Supervising Judge of the Tenth Statewide Investigating Grand Jury for a search warrant for the Northampton County location and requested sealing of the affidavit of probable cause in support of the search warrant and sealing of the list of items to be searched for and seized.

On September 9, 1995, Search Warrant Control No. L 18102 was issued by Supervising Judge Gates. When Judge Gates issued the search warrant, he reviewed the exhibits to the warrant. Exhibit "A" was the list of items to be seized. Exhibit "B" was the affidavit of probable cause. Judge Gates approved the issuance of the search warrant and, in the interests of justice and upon a finding of good cause, sealed the affidavit and the list of items. Throughout the affidavit, Agent Scott Fraley referred to documents subpoenaed by the grand jury. The block on the search warrant form which reads: "identify

items to be searched for and seized" -- was completed with the following language: "see exhibit 'A' sealed by order of the court."

On September 11, 1995, Search Warrant No. L 18102 was executed and documents were seized. Those executing the search had been briefed and knew exactly the items for which the search was authorized. Consistent with the search authorized by the warrant, only the enumerated records were searched for and seized. The face sheet of the warrant and the inventory describing the items seized pursuant to the warrant were provided to petitioners at the time of the search.

On September 18, 1995, upon motion by the attorney for the Commonwealth, Supervising Judge Gates unsealed Exhibit "A" to the search warrant and the list of items to the searched for and seized was provided to petitioners on September 21, 1995.[1]

After receiving the unsealed list, and with full knowledge that the items seized comported with those on the list, on September 25, 1995, the petitioners filed a motion for return of property seized pursuant to search warrant L 18102 in the Court of Common Pleas of Northampton County at No. M-217-1995. Return of the property was the relief sought by petitioners. Petitioners attached the face sheet of search warrant L 18102 and the receipt/inventory of items seized to their petition. They claimed that the seizure was illegal because the list of items to be seized was not set forth on the face of the

---

[1]The list of items for which the search took place as stated in Exhibit "A" read: "1. Payroll journals, time cards, employer withholding tax returns, bank records relating to payroll, time sheets relating to or used in the payroll process, check registers, employer withholding tax, state and federal personal income tax returns and all correspondence/documents relating to the preparation, amending or filing of employer withholding or personal income tax returns, for Gene BARTHOLOMEW, Robin BARTHOLOMEW and/or TOONES, Inc."

search warrant but was instead in a sealed exhibit to the search warrant.

The motion for return of property was thereafter presented to the Supervising Judge of the Statewide Investigating Grand Jury who conducted a hearing on the motion on January 16, 1996. On January 16, 1996, the affidavit of probable cause in support of Search Warrant was unsealed and entered into evidence at the hearing conducted by the Supervising Judge on the motion for return of property. It was clear from the affidavit that the search warrant was requested in connection with an investigation being pursued by the statewide investigating grand jury and that probable cause supported the search for and seizure of the items seized.

After the hearing, Judge Gates denied the motion and filed a memorandum opinion on March 25, 1996. Pet. App. B. Judge Gates held that the search warrant was specific as to the identify of the property for which the search was authorized. As supervising judge over an ongoing grand jury investigation, he approved the temporary sealing of the list and affidavit and he opined that the search pursuant to the warrant was constitutional. A petition for review was filed with the Pennsylvania Supreme Court seeking review of Judge Gate's Order. After the filing of the petition for review, on April 17, 1996, attorneys for the Commonwealth returned all of the items seized at the time of the execution of Search Warrant L 18102 to counsel for petitioners, Richard W. Kolosky, Esquire. The Pennsylvania Supreme Court denied review in a *per curiam* order. Pet. App. A.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Where the Relief Sought by the Petitioners Is the Return of Property Which Has Been Returned, This Court Should Not Entertain the Moot Issue of the Propriety of the Seizure of the Property.

This Court will not ordinarily decide constitutional questions presented in a case that has become moot. Both litigants must have a personal interest in the case at the beginning of the litigation, and their interests must persist throughout its entirety. *United States Parole Comm'n. v. Geraghty*, 445 U.S. 388, 396 (1980). "Constitutional questions are not to be dealt with abstractly." *Bandini Petroleum Co. v. Superior Court of California in and for Los Angeles Co.*, 284 U.S. 8, 22 (1931). This case is moot.

At the time petitioners filed their motion for return of property and at the time petitioners sought review in the Pennsylvania Supreme Court, there existed a controversy. That controversy concerned whether the property seized had to be returned. The property has been returned. The petitioners still think that this Court should determine whether the search was lawful. It should not.

This Court has often refused to pass on the merits of a constitutional issue which has become moot recognizing "[c]onstitutional adjudication [as] being a matter of 'great gravity and delicacy. . . .'" *Kremens v. Bartley*, 431 U.S. 119, 128 (1977), quoting, *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). "There must be a live case or controversy before the Court, *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). . . ." *Kremens, supra* at 128-29. Here the tax-related documents seized have all been returned. No live controversy is present.

Moreover, none of the exceptions to the mootness doctrine applies. This is not an issue "'capable of repetition, yet evading review.'" *United States v. New York Telephone Co.*, 434 U.S. 159, 165, n.6 (1977), quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Even the petitioners in this case may have an opportunity to further litigate their claims via a suppression motion if and when criminal charges are filed.

This Court should not now entertain the issue. The petition should be denied.

II. The Temporary Sealing of the List of Items to Be Searched for and Seized During the Execution of a Search Warrant Does Not Present a Serious Constitutional Issue Worthy of Review by This Court.

The temporary sealing of the part of the search warrant which identified the items to be searched for and seized did not violate the United States Constitution. The fact that those whose premises were being searched were not informed of the list at the time of the search does not detract from the fact that a list of particular items was part of the search warrant approved by the judge and the specific list guided the executing officers and restrained the scope of their search. The search was constitutional.

Petitioners allege violations of the Pennsylvania Constitution and the Pennsylvania Rules of Criminal Procedure as bases for a grant of the writ. They urge that Pennsylvania law is more stringent than the federal constitution and would provide a separate basis for invalidating the search. Obviously,

the Pennsylvania Supreme Court did not accept their argument[2] and this Court will not determine state law questions in the absence of a federal question. 28 U.S.C. § 1257(a) The only federal question presented is whether the list of items for which a search is authorized may be temporarily sealed under the fourth amendment. It may, and there is no serious constitutional question presented.

Nothing in the United States Constitution mandates that the warrant, or any part of it, be exhibited or delivered. Although by statute or court rule, many jurisdictions, including Pennsylvania, require that an executing officer deliver a copy of the warrant at the place searched, this requirement does not flow directly from the fourth amendment's proscription of unreasonable searches. Federal courts have consistently held that such provisions are ministerial, not of constitutional import, and that absent a showing of prejudice, violation of the directive to exhibit or deliver a warrant does not invalidate the search. *See e.g. Frisby v. United States*, 79 F.3d 29 (6th Cir. 1996) (agents' failure to serve taxpayer with attachment to search warrant that enumerated items to be seized did not render search and seizure unconstitutional; affirming denial of motion for return of property); *United States v. Hepperle*, 810 F.2d 836, 838 (8th Cir. 1987) (nothing in the fourth amendment requires that the search warrant be physically present prior to commencing the search), *cert. denied*, 483 U.S. 1025 (1987); and *United States v. Marx*, 635 F.2d 436, 441 (5th Cir. 1981) (failure to deliver a copy of search warrant

---

[2]Contrary to petitioner's suggestion, there is no "split" of authority on this issue in Pennsylvania. The county common pleas court decision relied upon by petitioners has no precedential value given the fact that the Pennsylvania Supreme Court's action in this case is a decision on the merits. *See* Pa.R.A.P. 3331(d) (denial of petition is a disposition on the merits unless otherwise ordered).

to party whose premises were searched until day after search did not invalidate search absent showing of prejudice from violation of ministerial rule).

This case simply does not present the question petitioners claim it does. The warrant did identify with particularity the list of items to be searched for and seized. The search was not rendered unconstitutional because that list was not immediately given to the petitioners.

If Judge Gates had issued the warrant without the items having been listed in Exhibit A, the warrant would violate the fourth amendment. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (where no items were listed at the time the justice signed the warrant, the warrant did not particularly describe the things to be seized, leaving it entirely to the discretion of the officials conducting the search to decide what items to seize.) Petitioners' reliance upon *Lo-Ji Sales* is misplaced. Judge Gates received and approved a search warrant with the list of items attached. As Judge Gates explained:

> As part of this investigation, Agent Scott L. Fraley of the Attorney General's Bureau of Narcotics Investigation and Drug Control, Financial Investigation Unit, prepared an application for a search warrant supported by a written affidavit which fully complied with the provisions of Pa.R.Crim.P. 2006. *The search warrant application specifically identified the items of property to be searched for and seized* as well as the name of the place to be searched.

In re: Seized Property of Rapid Return, Inc., No. 68 M.D. 1994 (Supreme Court), No. 601 M.D. 1994 (Dauphin County) (Notice No. 6), slip op. at 1-2 (March 25, 1996) Pet. App. B,

4a (emphasis supplied). Judge Gates dismissed the petitioners' allegations that he had approved the issuance of a general warrant. "There was no general warrant; the warrant was specific both as to the identity of the property to be searched, the things to be searched for and the probable cause basis for the search." *Id.*, at 5.

Petitioners' argument that the fact the list was sealed converted the warrant to a general warrant is not supported by the record. The petitioners continue to pretend as though the list did not exist long after they have seen it and have heard uncontradicted testimony that the list was present when the supervising judge issued the warrant.

Petitioners also ignore the record when they say no reason was given for the sealing by the supervising judge. Judge Gates articulated that:

> Because of the secretive nature of the Grand Jury's investigation and the contents of the affidavit of probable cause, we ordered that the affidavit of probable cause and the attached list of the items to be searched for and seized be sealed for a period of sixty (60) days. We certified on the face of the warrant that good cause had been shown why the affidavit in support of the search warrant be sealed pursuant to Pa.R.Crim.P. Rule 2011(c).

In re: Seized Property of Rapid Return, Inc., No. 68 M.D. 1994 (Supreme Court), No. 601 M.D. 1994 (Dauphin County) (Notice No. 6), slip op. at 2 (March 25, 1996) Pet. App. B, 4a. Judge Gates also certified on the face of the warrant that good cause had been shown why Attachment "A," the list of items to be searched for and seized, should be sealed for sixty days.

Contrary to petitioners' claims, Judge Gates' order is

not unprecedented. As discussed above, a number of federal courts have upheld searches where the list of items to be searched for and seized was not immediately made available to those whose premises were being searched.

As the procedure followed in this case is consistent with federal authority and does not present a constitutional question worthy of determination by this Court, this Court should deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Respondents request that this Honorable Court deny the petition for a Writ of certiorari.

Respectfully submitted,

Thomas W. Corbett, Jr.
Attorney General

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services

BY: Mary Benefield Seiverling
Senior Deputy Attorney General
Appeals and Legal Services
Counsel of Record

Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 787-6348